

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

APR 25 1996

In the Matter of)	
Amendment of Parts 20 and 24 of the)	
Commission's Rules -- Broadband PCS)	WT Docket No. 96-59
Competitive Bidding and the Commercial)	
Mobile Radio Service Spectrum Cap)	
)	DOCKET FILE COPY ORIGINAL
Amendment of the Commission's)	
Cellular PCS Cross-Ownership Rule)	GN Docket No. 90-314

**REPLY COMMENTS OF
NORTH COAST MOBILE COMMUNICATIONS, INC.**

North Coast Mobile Communications, Inc. ("NCMC") submits its Reply Comments in response to the Comments of other parties filed April 15, 1996 in the referenced proceeding.¹ In its Comments, NCMC urged the Commission to modify its competitive bidding rules for the remaining broadband PCS auctions to ensure that the subject 10 MHz licenses are quickly disseminated among a wide variety of new entrants to the commercial mobile radio service ("CMRS") marketplace. To accomplish this objective, NCMC encouraged the Commission first to eliminate its race- and gender-based bidding preferences in order to expedite the auction scheduling process, and second, to extend the modified C block designated entity preferences to the broadband PCS D, E and F blocks.

NCMC submits that there was broad (albeit not universal) consensus among the commenters in this proceeding supporting both a single, simultaneous D, E and F block auction, and the extension of small business incentives to qualified D and E block bidders. Consequently, in these Reply Comments, NCMC will focus on: 1) proposals to deter speculative excess in the subject auction by

¹*In the Matter of Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular PCS Cross-Ownership Rule, Notice of Proposed Rule Making in WT Docket 96-59 and GN Docket 90-314, FCC 96-119 (released March 20, 1996) ("NPRM").*

increasing the upfront payment and down payment requirements for qualified small businesses; 2) attempts by certain C block bidders to claim an automatic right to benefit from small business preferences in the upcoming 10 MHz auction based upon now obsolete pre-C block compliance with small business and entrepreneurs' block financial eligibility criteria; and 3) recommendations that various spectrum cap restrictions be relaxed or eliminated. In considering these and all other issues in this proceeding, the Commission should attempt to establish final rules that will have the effect of placing all past and future broadband PCS small business auction participants on a level playing field.

I. THE SMALL BUSINESS PREFERENCES

In these Reply Comments, NCMC reiterates its prior support for Commission inquiries in the *NPRM* asking whether the Commission should modify the F block competitive bidding rules so that they mirror the small business preferences offered to C block bidders. NCMC submits that to do otherwise would be to extend differential treatment to similarly situated entities, with no rational basis to justify the disparate treatment. In addition, such a rule modification should be immune to successful legal challenges.

NCMC also continues to support general proposals to extend the modified F block small business preferences to qualified entrepreneurial bidders in the D and E blocks, and specifically supports the Commission's tentative conclusion that extension of installment payments will result in the dissemination of D and E block licenses to a wider variety of applicants.² However, NCMC asserts that small business applicants for the 10 MHz licenses require more than just installment payment preferences to effectively compete against the telecommunications giants that will participate in the D, E and F block auction. Many potential small business D, E and F block

²*NPRM* at ¶ 54.

applicants hope to aggregate the three 10 MHz licenses available in each BTA in order to compete with the 30 MHz PCS licensees and cellular incumbents. Even without license aggregation plans, these potential PCS applicants will face significant bidding competition from the incumbent CMRS licensees. If the Commission does not make available the full panoply of small business incentives³ to entrepreneurs participating in the 10 MHz license auction, those small business applicants will be utterly unable to prevail in an auction where they will be competing against incumbent CMRS licensees with substantial vested interests to protect.

A. Proposals to Modify the Upfront Payment and Downpayment Requirements

While the majority of commenters supported the extension of small business preferences to the D, E and F block auction as described above, a few advanced various proposals to revise (primarily to increase) the small business upfront payment and down payment requirements in an effort to deter speculation and guard against bidder default in the remaining broadband PCS auction. NCMC does not believe that such upward modifications are necessary or justified for a variety of reasons. First, the Commission has not experienced significant bidder default in the seven auctions that it has conducted through the down payment stage thus far. Second, the Commission recently emphasized to all auction participants that it does not intend to waive or extend any payment deadlines, regardless of auction results. If the Commission continues to reiterate this as a firm policy, bidders will not risk the potential significant financial liability. Finally, the Commission could strengthen other competitive bidding rules in order to deter speculation and default, without adversely affecting the financing options for small businesses. For example, an increase in the

³These preferences include reduced upfront payments and down payments, a 25% bidding credit and installment payment financing.

default penalty provisions, coupled with an aggressive default penalty enforcement policy could serve the same anti-speculation purpose.⁴

However, if the Commission determines that it is appropriate to adopt revised upfront and down payment rules for qualified small businesses competing for D and E block licenses, NCMC submits that the availability of an even larger bidding credit than proposed above is essential if small business applicants are to have a realistic chance of acquiring D and/or E block licenses in head-to-head competition with CMRS incumbents.⁵ While an increase in the upfront payment **coupled with** an increase (to 20% or more) in the down payment requirement **may** have the effect of discouraging inadequately capitalized applicants from participating in the auction, it **certainly** will have a significant adverse impact on the financing options of legitimate small business applicants. For example, with regard to the call for an increased upfront payment, NCMC observes that this modification would likely preclude many legitimate small businesses from participating in the 10 MHz license auction at all. If the Commission were to adopt GO Communications Corporation's suggestion of requiring an upfront payment of 20% of the amount the applicant intends to bid,⁶ this would have a dramatic negative impact on the ability of virtually all small businesses to attract capital, which in turn would decrease the total number of small business competitors for the D, E

⁴As explained in more detail in footnote 16, *infra*, NCMC supports the proposal to supplement Section 24.710 of the Commission's rules, which limits the number of C and F block licenses that can be won to 98, with a total population cap rule. Such a rule would deter speculative excess in future designated entity auctions by barring a single entity from acquiring so many high value licenses (representing a large number of pops) that it could not possibly make the required payments.

⁵The increased bidding credit would only be required in the D and E blocks, where small business applicants would be in head-to-head competition for licenses against the CMRS incumbents that presently dominate their respective markets.

⁶Comments of GO Communications Corporation at pp. 1-2.

and F block licenses.⁷ Furthermore, small businesses are much less likely to be able to put millions of dollars into non-interest bearing accounts for months at a time.⁸

Proposals to increase the small business down payment requirement similarly would have a profound detrimental effect on small business applicants' capability to place realistic bids, and consequently would impact the level of real competition for these licenses. To illustrate, under the present rules, if a small business applicant was capitalized in the amount of \$100 at the start of an auction, it legitimately could place bids of up to \$1,000 during the course of the auction. If you take the same scenario, changing only the down payment percentage (from 10% to 20%), the applicant's bidding capability effectively is cut in half. Specifically, the applicant could only bid up to \$500 instead of \$1,000. The repercussions from such a change are obvious, small businesses would have no realistic chance of competing for D and E block licenses.

To compensate for the dramatic negative consequences that revised upfront and down payment requirements would create, NCMC strongly recommends that the small business bidding credit be increased to 40% for small businesses bidding in the D and E block. Without the concomitant modification to the bidding credit preference, the effectiveness of all of the small business preferences in the D and E blocks will be gutted

⁷NCMC also notes that having differing methods to calculate the upfront payment due for designated entities as opposed to non-designated entities in a consolidated auction could have incongruous (and potentially legally significant) results. For example, if GO's 20% upfront payment suggestion was adopted, it is possible that a small business applicant that intends to only bid on 10 licenses (with a high anticipated value) might have to make a higher upfront payment to the US Treasury (without receiving interest) than would a non-designated entity applicant seeking those same 10 licenses, since the latter upfront payment would be calculated on a bidding unit basis.

⁸NCMC observes that at the time these Reply Comments are filed, active C block bidders have forgone interest on many millions of dollars of upfront payments for over four months.

II. APPLICATION OF FINANCIAL ELIGIBILITY CRITERIA TO C BLOCK BIDDERS

The Commission's inquiry in the *NPRM* as to whether any qualified C block bidder should automatically be allowed to bid on F block licenses, or whether the value of those licenses should be included in the small business financial eligibility calculation,⁹ has emerged as a hotly contested issue among the commenters that addressed the issue. While the majority of commenters opposed allowing any qualified C block bidder to automatically qualify to participate in the F block auction,¹⁰ it is not surprising that only the two highest bidders in the C block auction supported the idea.¹¹ For the reasons stated below, NCMC continues to strongly oppose the suggestion, and contends that the Commission's own rules have never guaranteed to any party an automatic right to participate in any of the entrepreneur block auctions.

NextWave argues that until the subject *NPRM* was released, the Commission "had given no indication that it might consider licenses acquired in the C block to be assets for purposes of entrepreneurs' block eligibility."¹² However, contrary to NextWave's contentions, NCMC notes that Section 24.709(a)(1) of the Commission's rules has always stated that financial eligibility for

⁹*NPRM* at ¶¶ 33, 50.

¹⁰*See, e.g.*, Comments of Point Enterprises, Inc. (letting C block bidders automatically into the F block "would just allow them to eliminate additional competition and waste spectrum"); Comments of Cook Inlet Region, Inc. (parties with sufficient resources to acquire C block licenses covering more than 5 million pops "likely do not need additional Federal assistance in the remaining broadband PCS auctions").

¹¹*See* Comments of NextWave Telecom Inc. ("NextWave") at pp. 3-5; Comments of DCR Communications, Inc. ("DCR") at pp. 6-8. For example, NextWave argues that it would not be fair to "artificially exclude" C block bidders from the F block auction based on the valuation of their C block licenses. NCMC suggests that there is nothing artificial about the value of the over \$4 billion worth of standing high bids NextWave presently can claim in the C block auction. Presumably, NextWave has the financing in place necessary to support its acquisition of those licenses as required by the rules.

¹²NextWave Comments at p. 5.

frequency blocks C and F will be determined "at the time the applicant's short-form (Form 175) application is filed."¹³ NextWave (and all other C block bidders) have been aware since December 1994 that the C and F blocks would be auctioned separately. While the Commission did not originally envision separate C and F block auctions when it released its *Fifth Report and Order* five months earlier in July 1994, bidders had at least one year's notice of the separate auctions before the C block bidding began, and accordingly, had sufficient time to adjust their five-month old bidding strategies.¹⁴ Since the relevant portion of the financial eligibility rule section has not changed since July 1994, NextWave's reliance argument is unjustified. NCMC also notes that the **vast majority** (presently, over 98%) of qualified C block bidders will be unaffected by the Commission's application of its existing rules in the context of determining F block bidder eligibility.

NCMC also disputes NextWave's argument that the C and F block license aggregation rule¹⁵ automatically authorizes C block bidder participation in the F block auction. This argument defies logic and is inconsistent with Congress' policy of extending preferences to entrepreneurs and small businesses in the competitive bidding process. Just because Section 24.710 of the rules envisions that certain bidders will acquire both C and F block licenses, does not mean that bidders are exempt from application of the financial eligibility criteria. The license aggregation rule has nothing to do with an applicant's **financial** eligibility to participate in the F block auction (and affects overall

¹³47 C.F.R. § 24.709(a)(1). In fact, NCMC notes that the primary reason it withdrew from the C block auction was because the prices being bid for markets in which NCMC was interested went so high that it would have been impossible for NCMC to implement its business plan. Accordingly, NCMC then decided to focus on the F block auction since under the Commission's rules the largest C block winners would be precluded from participating, and presumably license prices in the F block auction might be more reasonable.

¹⁴In the case of NextWave, NCMC notes that NextWave's Form 175 indicates the company was not even formed until some time in 1995. Accordingly, it was always aware of the revised entrepreneur block auction schedule.

¹⁵47 C.F.R. § 24.710.

eligibility only if a bidder had acquired 98 licenses in the C block auction), nor does it grant **all** bidders an absolute right to participate in or to receive significant federally-subsidized financing.¹⁶ Rather, those types of financial qualification issues are addressed under Section 24.709 of the rules.¹⁷

Finally, NextWave and DCR's reliance on the Commission's unjust enrichment rule to support their F block eligibility claims is misplaced. There is no necessary or logical relationship between the Commission's rationale behind the unjust enrichment rule (i.e., continuation of a preference originally granted when an applicant actually met the small business eligibility criteria) and the subsequent extension of new, federally-subsidized financing preferences to applicants in a separate designated entity auction.

¹⁶As referred to in footnote 4, *supra*, NCMC generally supports Cook Inlet Region Inc.'s ("CIRI") proposal to supplement Section 24.710 of the rules, the C and F block license aggregation rule, with a rule precluding parties who have sufficient resources to acquire C block licenses covering a certain percentage of the US population from obtaining additional preferences in future auctions. *See* Comments of Cook Inlet Region, Inc. at pp. 9-10. However, NCMC contends that the two percent/five million population figure advanced by CIRI is far too restrictive. If a C block bidder applicant were the successful bidder in just one of five BTAs, it would be precluded from obtaining additional preferences in the F block auction. Consequently, NCMC supports a 20% population cap, which would permit small business applicants to establish regional clusters of licenses, while preventing the speculative excess that has marred the C block auction.

¹⁷In applying the financial eligibility criteria to C block bidders who wish to participate in the remaining broadband PCS auction, NCMC urges the Commission to require that the **current market value** of C block licenses won be utilized in calculating the applicant's total assets. For example, winning C block bidders should add up their **gross** bids placed for licenses and use that figure in their total assets calculation. Similarly, if a D, E and F block applicant previously had been awarded a broadband PCS license, the value of that license should be calculated based on the gross bid placed for that same market in the C block auction. As the C block auction comes to a close, it has become readily apparent that the prices paid for licenses by broadband PCS A and B block auction participants were depressed due to the lack of real competition in that auction (i.e., only 18 companies won 99 licenses), and the market actually places a much higher value on 30 MHz broadband PCS licenses.

III. CMRS SPECTRUM CAP PROPOSALS

Certain commenters, in particular the cellular industry, urge the Commission to eliminate all spectrum caps except for the 45 MHz CMRS spectrum cap. NCMC strongly opposes the elimination of any existing spectrum caps. Further, upon review of the Comments submitted in this proceeding, NCMC supports the proposal of PersonalConnect Communications, LLC to revise the existing 45 MHz CMRS spectrum cap to 35 MHz. A revised 35 MHz spectrum cap would put all CMRS providers on level footing, and is not contrary to the Sixth Circuit's findings in *Cincinnati Bell Telephone Co. v. FCC*.¹⁸ In the *Cincinnati Bell* case, the Sixth Circuit determined only that the Commission's cellular/PCS cross-ownership rule and 20% attribution rule were arbitrary and capricious. The court did not determine that the concept of a spectrum cap, uniformly applied to all CMRS licensees, was arbitrary.

If the Commission were to eliminate all caps but the 45 MHz CMRS spectrum cap, it would have the obvious effect of allowing an incumbent cellular licensee to acquire two of the three available 10 MHz licenses in each BTA where it operates. Given the financial capabilities of the cellular industry, it would be extremely difficult, if not impossible, for a small business applicant to win either a D or E block license in a BTA that is crucial to a cellular incumbent. Furthermore, relaxation of the existing spectrum caps would only encourage warehousing of CMRS spectrum and discourage spectral efficiency among CMRS licensees. Given the advent of digital technology in the CMRS marketplace, 45 MHz is an **enormous**, and unnecessary, amount of spectrum for any single CMRS licensee to control. Consequently, the 45 MHz spectrum cap should be replaced with a 35 MHz spectrum cap.

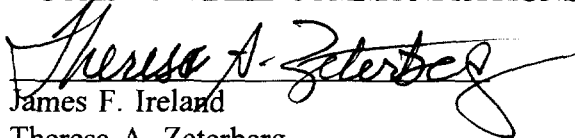
¹⁸69 F.3d 752 (6th Cir. 1995).

IV. CONCLUSION

North Coast Mobile Communications, Inc. respectfully requests that the Commission modify its competitive bidding and ownership rules for the D, E and F broadband PCS frequency blocks to the extent detailed in these Comments.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Courtney D. Smith do hereby certify that on this 25th day of April 1996, I have caused a copy of the foregoing to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

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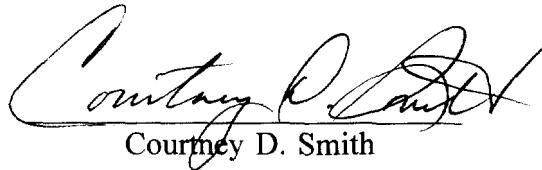
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